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Supreme Court, U.S.
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NO. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1996

FRANK HOLT
Plaintiff-Petitioner

vs.

JTM INDUSTRIES, INC.
Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI
to the
United States Court of Appeals
For the Fifth Circuit
(CASE NO. 95-50145)

John Patrick Atkins
Counsel of Record
Philip E. McCleery
SHEEHY, LOVELACE & MAYFIELD, P.C.
510 N. Valley Mills Dr., Suite 500
Waco, Texas 76710
(817) 772-8022
FAX (817) 772-9297
Attorneys for Petitioner

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967 ("ADEA") and Title VII of the Civil Rights Act of 1964, ("Title VII"), prohibit an employer from retaliating against a third party for the protected activity of an employee?

2. Has Petitioner stated a claim upon which relief may be granted under the ADEA and Title VII where he and his wife work for the same employer and he is retaliated against as a result of his wife's filing of an administrative complaint of employment discrimination, as was found by the jury in this case?

3. Does a husband have standing to assert a cause of action for retaliation, under the ADEA and Title VII where the husband and wife work for the same employer, and the husband is retaliated against as a result of his wife's filing of an administrative complaint of employment discrimination, as was found by the jury in this case?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case.

1. MR. FRANK HOLT and MRS. LINDA HOLT, residents of Mexia, Texas, the Plaintiffs in the District Court proceeding.

2. PHILIP E. McCLEERY and JOHN PATRICK ATKINS, Sheehy, Lovelace & Mayfield, P.C., Waco, Texas, attorneys for the Plaintiffs.

3. JTM INDUSTRIES, INC., a Texas corporation with its principal place of business in Kennesaw, Georgia, Defendant.

4. LAIDLAW ENVIRONMENTAL SERVICES, INC., a South Carolina corporation and parent company of JTM INDUSTRIES, INC.

5. UNITED STATES POLLUTION CONTROL, INCORPORATED ("USPCI"), a Delaware corporation with its principal place of business in Houston, Texas, former parent company of JTM INDUSTRIES, INC., and Defendant in the District Court proceeding.

6. UNION PACIFIC, parent company of USPCI.

7. LIONEL M. SCHOOLER, Gilpin, Paxson & Bersch, LLP, Houston, Texas, attorneys for Defendants USPCI and JTM INDUSTRIES, INC.

8. DAVID G. TEKELL, Naman, Howell, Smith & Lee, P.C., Waco, Texas, local counsel for Defendants USPCI and JTM INDUSTRIES, INC., in the District Court proceeding.

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FRANK HOLT

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PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS OF LOWER COURTS

The opinion and dissenting opinion of the Court of Appeals are reported at 89 F.3d 1224 and are reproduced in the Appendix filed herewith, at A-1. The unreported Order of the Court of Appeals denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is reproduced in the Appendix, at A-31. The December 24,

1996 Judgment of the Court of Appeals is reproduced in the Appendix, at A-33. The unreported Judgment of the District Court is reproduced in the Appendix, at A-35.

STATEMENT OF JURISDICTION

Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C. §1254(1), in that this Petition seeks review of a judgment entered by the United States Court of Appeals for the Fifth Circuit on appeal from a judgment upon jury verdict in favor of the Petitioner rendered by the United State District Court for the Western District of Texas, Waco Division.

This Petition is filed for the dual purposes of securing uniformity of decisions between Circuit Courts of Appeal and to raise a question of importance that significantly affects the case at hand and which is of grave public interest in the area of employment law.

STATUTES INVOLVED

The pertinent provisions of the Age Discrimination in Employment Act of 1967 are found at 29 U.S.C. §623(d), and are set forth below:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment...because such individual...has opposed any practice made unlawful by this section, or because such individual...has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

The pertinent provisions of the Title VII of the Civil Rights Act of 1964 are found at 42 U.S.C. §2000e-3(a), and are set forth below:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

In June, 1985, FRANK HOLT began his employment with JTM INDUSTRIES, INC. ("JTM"). For the next eight years, Mr. Holt maintained bottom-line responsibility and management over JTM's Limestone facility.

JTM is a waste disposal corporation, concentrating on the disposal and sale of ash and other byproducts generated by public utilities. JTM's Limestone facility, is the largest of JTM's operations in volume and revenue. At the Limestone facility, JTM operates an onsite landfill owned by Houston Lighting & Power ("HL&P"). The 294-acre landfill is part of a power plant in Limestone County, Texas, where HL&P burns approximately 7 million tons of lignite coal per year, and generates approximately 2 million tons of ash per year.

Prior to the termination of his employment in 1993, Mr. Holt spent eight years managing the Limestone facility. At the time of his hire in 1985, Mr. Holt had thirty years of experience in earth moving operations. The late Bart Thomas, former President of JTM, and the man responsible for hiring Mr. Holt, testified that Mr. Holt was hired because he was one of the best "dirt men" in the country. Specifically, FRANK HOLT had a unique ability to move large volumes of soil or ash in a cost-efficient manner. Accordingly, high expectations were placed on Mr. Holt when he accepted the job, and he did not disappoint. Under Mr. Holt's management, the Limestone facility was the most profitable of all JTM operations. Under Mr. Holt's management, the facility never received a citation for environmental violations. Under Mr. Holt's management, the Limestone facility became JTM's "showcase", and prospective clients were brought to the plant to see the type and quality of service that JTM was

capable of providing. During his eight years with the company, Mr. Holt received numerous outstanding service awards, letters of commendation, and bonuses. Mr. Holt's annual performance evaluations never reflected an unsatisfactory rating.

Frank Holt's wife, Linda Holt was employed as office manager at JTM's Limestone Plant. Prior to May, 1993, Mrs. Holt was terminated from her position as a result of a newly enacted nepotism policy which prohibited her employment at a location where her husband was manager. At the time, JTM had an opening for an office manager at a neighboring location. Mrs. Holt applied for the position but was not hired. A younger, less experienced female was hired. On May 10, 1993, Mrs. Holt filed a complaint of employment discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Texas Commission on Human Rights ("TCHR") complaining that the Company had discriminated against her because of her age. On May 21, 1993, a notice of the administrative complaint was served on Mr. Holt, for JTM, at the Limestone facility. He contacted JTM's Director of Human Resources and at her request, the administrative complaint was sent via Federal Express to JTM's corporate offices in Kennesaw, Georgia.

Two weeks later, on June 7, 1993, JTM regional manager, Chuck Anderson, advised Mr. Holt that he was being placed on administrative leave for two weeks while the company

investigated allegations of misconduct. Mr. Holt was instructed to leave the facility immediately and was forbidden to talk to any employees. Over the next two weeks, no one from JTM contacted Mr. Holt or attempted to conduct any type of investigation. Furthermore, despite JTM's claims that Mr. Holt was placed on leave because of alleged concerns regarding disclosure of confidential information, no one from JTM ever contacted the individual to whom the information was allegedly being disclosed. Two and a half weeks later, Mr. Holt received a message that Bill Fletcher, president of JTM, wanted to meet with him the next morning.

Despite the fact that no investigation was undertaken while Mr. Holt was on leave, Mr. Holt was told that the president of the Company had lost confidence in his ability, and Mr. Holt was being removed from his position as plant manager of the Limestone plant. At the meeting, Mr. Holt received no specific facts supporting any allegations relating to his conduct or management of the facility. During the trial, JTM attempted to prove that Mr. Holt was guilty of varying degrees of egregious conduct, including the disclosure of confidential information, disloyalty to the company, poor management, poor maintenance of the equipment, failure to train personnel, and ineffective communication. However, the company did not fire Mr. Holt. Rather, they removed him from his position as plant manager and reassigned him to a new position within the company. The new position required a lesser degree of

responsibility and would require the 63-year old Mr. Holt to spend almost all his time traveling around the country to different facilities. Mr. Holt requested and was assured that he would be allowed to work out of Texas, because of the costs and difficulties in relocating his family to Atlanta.

Later, Mr. Holt was advised that, despite JTM's previous representations to the contrary, he would be required to report to the Atlanta office and work out of the Atlanta office, beginning the following week. Mr. Holt made JTM aware that he believed the new position required him to travel too much, and accordingly, he was requesting reinstatement to his previous position at the Limestone facility. After an exchange of correspondence between Mr. Holt and JTM, Mr. Holt's employment with JTM was terminated, effective August 13, 1993.

In December 1993, Frank Holt and his wife, Linda Holt, filed a Complaint in the United States District Court for the Western District of Texas under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.* ("ADEA") and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) ("Title VII") against JTM and its parent corporation USPCI alleging, *inter alia*, claims of age and sex discrimination as to Linda Holt and age discrimination and retaliation as to Frank Holt. Trial was convened before a jury on November 28, 1994 and lasted four days. At the conclusion of Plaintiff's case in chief, Defendants' motion

for judgment as a matter of law was denied. After all parties rested, Defendants again moved for judgment. Defendant USPCI's motion was granted on the basis that Plaintiffs were not shown to be employees of USPCI. Defendant JTM's motion for judgment was denied.

On December 1, 1994, the jury returned its verdict finding that Frank Holt was removed from his position as plant manager in retaliation for his wife's filing of an age discrimination claim against JTM. The jury found that the retaliatory acts of JTM were willful and that Frank Holt suffered actual damages in the amount of $100,000.00. The jury further found against Linda Holt on her claim of age discrimination. On February 1, 1995, after overruling JTM's post verdict motions, the District Court entered judgment in conformity with the jury verdict, awarding $200,000 in damages, plus attorney's fees, and ordering Mr. Holt's reinstatement.

JTM filed its notice of appeal and appealed to the United States Court of Appeals for the Fifth Circuit. On August 7, 1996, after having received oral argument, the Court of Appeals, with a dissenting opinion, reversed the District Court and entered judgment dismissing the case based upon the Court's determination that Plaintiff, Frank Holt, lacked standing. On December 13, 1996, the Court of Appeals entered an Order denying both the Petition for Rehearing and the Suggestion for Rehearing En Banc. Petitioner requests that the judgment of the Court of

Appeals be reversed and the judgment of the trial court be affirmed.

REASONS FOR GRANTING THE WRIT

This Court should grant the Writ in order to resolve a split between the Federal Circuit Courts of Appeal on an important question regarding employer liability for retaliation against a third party for the protected activity of a co-employee.

The decision by the United States Court of Appeals for the Fifth Circuit in this case conflicts with all published authority from the other Federal Courts of Appeal, the Federal District Courts, and the Equal Employment Opportunity Commission, the administrative agency charged with enforcement of Title VII and the ADEA.

In each of the following cases, the Courts held that the plaintiffs had a cause of action, where they suffered an adverse employment action in retaliation for a spouse, close relative, or associate having engaged in protected activity: *EEOC v. Ohio Edison Co.,* 7 F.3d 541, 543 (6th Cir. 1993) (Plaintiff retaliated against as a result of representative's complaint of race discrimination.); *Wu v. Thomas,* 863 F.2d 1543, 1547 (11th Cir. 1989) (Husband retaliated against as a result of wife's protected complaint.); *Thurman v. Robertshaw Control Co.,* 869 F.Supp. 934 (N.D.Ga. 1994) (Husband claims retaliatory discharge as a result of wife's

protected activity.); *Mandia v. ARCO Chemical Co.*, 618 F.Supp. 1248, 1250 (W.D.Pa. 1985) (Husband retaliated against as a result of wife's filing EEOC complaint for sex harassment.); *Clark v. R. J. Reynolds Tobacco Co.*, 27 FEP Cases 1628, 1982 WL 2277 (E.D.La. 1982) (A *prima facia* case under Title VII is established if it is alleged that the charging party "was statutorily protected from retaliation by the Defendant by being the relative of an employee who has engaged in statutorily protected activity".); *DeMedina v. Reinhardt*, 444 F.Supp. 573, 580 (D.D.C. 1978) (Wife retaliated against as a result of protected activities of husband.); *United States v. City of Socorro*, 25 FEP 815, 1976 WL 523 (D.N.M. 1976) (Act was violated when husband was threatened because his wife was engaging in protected activities.); *Kombluh v. Stearns and Foster Co.*, 73 F.R.D. 307 (N.D. Ohio 1976) (Plaintiff was entitled to be heard on issue of retaliatory discharge because of his wife's lawful engagement in picketing the employer.). *See also Simmons v. Lyons*, 746 F.2d 265, 270-71 n.7 (5th Cir. 1984), (Where mother claims she was retaliated against as a result of alleged complaints of sex discrimination filed by daughter employed by the same employer, Fifth Circuit discusses the issue of third-party reprisals, but does not suggest that plaintiff failed to state a claim.).

The Fifth Circuit implemented a narrow and literal interpretation of the anti-retaliation provisions of the ADEA and Title VII, in direct contravention of prior holdings of the Federal Circuit Courts of Appeals and the Supreme

Court. *Robinson v. Shell Oil Co.,* 1997 WL 63007, p. 4-5 (US Feb. 19, 1997); *Mitchell v. Robert DeMario Jewelry, Inc.,* 361 US 288, 292, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *EEOC v. Ohio Edison Co.,* 7 F.3d at 544.

The decision by the United States Court of Appeals for the Fifth Circuit would allow an employer to deter an individual from exercising his rights under Title VII or the ADEA, by utilizing retaliation against a spouse or other family member who was also an employee of the company. The Fifth Circuit's opinion ignores the reality that the threat of retaliatory action against a family member or friend is a substantial deterrent to the free exercise of rights protected under the ADEA and Title VII. The Court's holding thus permits the very conduct that the anti-retaliation provisions are designed to prevent. Such an interpretation of the anti-retaliation provisions would produce absurd and unjust results. *DeMedina,* at 580.

This result precludes victims of retaliation from pursuing claims available to them, and it is violative of the principle that Title VII and the ADEA should be liberally interpreted to carry out Congressional intent. *Albemarle Paper Co. v. Moody,* 422 US 405, 417-19 (1975). This result can not be allowed to stand.

WHETHER THE ADEA AND TITLE VII PROHIBIT AN EMPLOYER FROM RETALIATING AGAINST A THIRD PARTY FOR THE PROTECTED ACTIVITY OF AN EMPLOYEE?

HAS PETITIONER STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED UNDER THE ADEA AND TITLE VII WHERE HE AND HIS WIFE WORK FOR THE SAME EMPLOYER AND HE IS RETALIATED AGAINST AS A RESULT OF HIS WIFE'S FILING OF AN ADMINISTRATIVE COMPLAINT OF EMPLOYMENT DISCRIMINATION, AS WAS FOUND BY THE JURY IN THIS CASE?

Contrary to Rulings of Other Courts. The majority holding of the Court of Appeals that Frank Holt lacked standing to sue for third-party retaliation under the anti-retaliation provision of the ADEA and Title VII, is without precedent[1]. All of the cases which have considered the issue of third party retaliations have concluded that the

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[1]The anti-retaliation provisions of the ADEA are substantially identical to the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e)-3(a). Cases interpreting the later provision are frequently relied upon in interpreting the former. See *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 n5 (5th Cir. 1992).

Plaintiffs have stated a claim upon which relief may be granted or, stated otherwise, have a cause of action.[2]

The following Courts have held contrary to the Fifth Circuits's holding in the case at hand, and have concluded that plaintiffs have a cause of action where they suffer an adverse employment action in retaliation for their spouse, close relative or associates having engaged in protected activity under Title VII or similar employment anti-retaliation statutes: *EEOC v. Ohio Edison Co.,* 7 F.3d 541, 543 (6th Cir. 1993) (Plaintiff retaliated against as a result of representative's complaint of race discrimination.); *Wu v. Thomas,* 863 F.2d 1543, 1547 (11th Cir. 1989) (Husband retaliated against as a result of wife's protected complaint.); *Thurman v. Robertshaw Control Co.,* 869 F.Supp. 934 (N.D.Ga. 1994) (Holding "In a case of alleged retaliation for participation in a protected activity by a close relative who is a co-employee, the first element of the prima facie case is modified to require the plaintiff to show that the relative was engaged in a statutorily protected expression."); *Mandia v. ARCO Chemical Co.,* 618 F.Supp. 1248, 1250

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[2]Though the Fifth Circuit addressed the issue in terms of "standing", most courts, in considering third party reprisal claims have analyzed the issue in terms of whether the Plaintiff has stated a claim upon which relief can be granted. This portion of the Petition addresses third party reprisals with respect to whether Petitioner has a cause of action. However, because the Fifth Circuit addressed the issue in terms of standing, Petitioner addresses the standing issue separately, below.

(W.D.Pa. 1985) (Husband retaliated against as a result of wife's filing EEOC complaint for sex harassment.); *Clark v. R. J. Reynolds Tobacco Co.,* 27 FEP Cases 1628, 1982 WL 2277 (E.D.La. 1982) (A *prima facia* case under Title VII is established if it is alleged that the charging party "was statutorily protected from retaliation by the Defendant by being the relative of an employee who has engaged in statutorily protected activity".); *DeMedina v. Reinhardt,* 444 F.Supp. 573, 580 (D.D.C. 1978) (Wife retaliated against as a result of protected activities of husband.); *United States v. City of Socorro,* 25 FEP 815, 1976 WL 523 (D.N.M. 1976) (Act was violated when husband was threatened because his wife was engaging in protected activities.); *Kombluh v. Stearns and Foster Co.,* 73 F.R.D. 307 (N.D. Ohio 1976) (Plaintiff was entitled to be heard on issue of retaliatory discharge because of his wife's lawful engagement in picketing the employer.). *See also Simmons v. Lyons,* 746 F.2d 265, 270-71 n.7 (5th Cir. 1984), (Where mother claims she was retaliated against as a result of alleged complaints of sex discrimination filed by daughter employed by the same employer, Fifth Circuit discusses the issue of third-party reprisals, but does not suggest that plaintiff failed to state a claim.); *Cairo v. OH Material Corp.,* 710 F.Supp. 1069, 1072 n.12 (M.D.La. 1989).

As was noted by the Court in *DeMedina*:

> Congress unmistakably intended to insure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation. Since tolerance of third party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII, the Court must conclude... that Section 2000e-3 proscribes the alleged retaliation of which plaintiff complains.

DeMedina, 444 F.Supp. at 580.

The Seventh Circuit has recently ruled that Title VII permits a Plaintiff to assert a cause of action for retaliation where he failed to prevent third parties from engaging in protected conduct. *McDonnell v. Cisneros,* 84 F.3d 256, 262 (7th Cir. 1996). The *McDonnell* Court held **"generally one retaliates against someone because of something he did rather than because of something someone else did. Not always. There is such a thing as collective punishment."** *Id.*

Additionally, EEOC regulations and interpretations have concluded that the anti-retaliation provisions protect a third party from retaliation, when the third-party is closely related to a person exercising his/her statutory rights. 2 EEOC Compliance Manual §614, at 614.0001, 614.0008-.0009 (Apr. 1988). The EEOC has specifically held that it has

jurisdiction to investigate a claim that the charging party had been discharged in retaliation for his wife's filing a charge of discrimination against the employer. EEOC Decisions Dec. 77-34 (August 16, 1977)(CCH EEOC Dec. ¶6581).[3]

The Fifth Circuit's narrow interpretation of the anti-retaliation provisions "would produce absurd and unjust results." *DeMedina,* 444 F.Supp. at 580. Specifically, the decision would allow an employer to deter an individual from exercising his rights under Title VII or the ADEA, by utilizing retaliation against a spouse or other family member who was also an employee of the company. The Fifth Circuit's opinion ignores the reality that the threat of retaliatory action against a family member or friend is a substantial deterrent to the free exercise of rights protected under the ADEA and Title VII. The Court's holding thus permits the very conduct that the anti-retaliation provisions are designed to prevent. Furthermore, the Fifth Circuit's interpretation conflicts with all known precedent and should be reversed.

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[3]The interpretation of a statute by the administrative agency charged with its enforcement is entitled to great deference by the Court. *Albemarle Paper Co. v. Moody,* 422 US 405, 431; 45 L.Ed 2d 280, 304; 95 S.Ct. 2362 (1975); *Griggs v. Duke Power Co.,* 401 US 424, 433-434, 28 L.Ed 2d 158, 165; 91 S.Ct. 849 (1971).

Narrow and restrictive interpretation. In concluding that Mr. Holt lacked standing to bring suit for retaliation under the ADEA, the Fifth Circuit utilized a narrow, literal interpretation of the statute. However, a rigid, literal interpretation of the anti-retaliation provisions should not be employed to undermine clear Congressional intent. *Bob Jones University v. United States,* 461 U.S. 574, 585, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983) ("It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute.")

Additionally, Title VII and the ADEA should be accorded a liberal interpretation in order to effectuate the purpose of Congress. *Robinson v. Shell Oil Co.,* 1997 WL 63007, p. 4-5 (US Feb. 19, 1997); *MacDonald v. Eastern Wyoming Mental Health Center,* 941 F.2d 1115, 1118 (10th Cir. 1991); *Kale v. Combined Ins. Co.,* 861 F.2d 746, 751 (1st Cir. 1988); *Rabzak v. County of Berks,* 815 F.2d 17, 20 (3rd Cir. 1987); *Hamilton v. Rodgers,* 791 F.2d 439, 442 (5th Cir. 1986); *Rogers v. Equal Employment Opportunity Commission,* 454 F.2d 234, 238 (5th Cir. 1971).

The rule of broad construction of the ADEA and Title VII as well as other anti-discrimination statutes such as the Fair Labor Standards Act, the Fair Housing Act and the National Labor Relations Act is universal. Specifically, with respect to the anti-retaliation provisions at issue in

this case, the Courts have previously recognized that it is appropriate to reach beyond a narrow literal reading of the provisions in order to carry out Congressional intent. *Robinson v. Shell Oil Co.* (Holding that the term "employee" in anti-retaliation provision includes former employees.); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 US 288, 292, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *EEOC v. Ohio Edison Co.*, 7 F.3d at 544 ("Courts have routinely adopted interpretations of retaliation provisions in employment statutes that might be viewed as outside the literal terms of the statute in order to effectuate Congress's clear intent."); *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1088-89 (5th Cir. 1987) (Holding that though a liberal reading of the anti-retaliation provisions of the ADEA would apply only to "employees or applicants for employment", the term "employee" must be interpreted broadly to include former employees.); *Payne v. McLemore's Wholesale & Retail Stores,* 654 F.2d 1130, 1140-41 (5th Cir. 1981) (Court concludes that in order "to effectuate the policies of Title VII and to avoid the chilling effect that would otherwise arise," Court interprets the term "unlawful employment practice" to include a Plaintiff's **reasonable belief** that the employer was engaged in unlawful employment practices. *See also Id.*, at 1147 (Coleman, J., dissenting).).

The Fifth Circuit's holding in the instant case, resulting from a narrow and literal construction of Title VII and the ADEA, flies in the face of universal authority from

the Federal Courts of Appeal and the Supreme Court for a broad interpretation.

DOES A HUSBAND HAVE STANDING TO ASSERT A CAUSE OF ACTION FOR RETALIATION, UNDER THE ADEA AND TITLE VII WHERE THE HUSBAND AND WIFE WORK FOR THE SAME EMPLOYER, AND THE HUSBAND IS RETALIATED AGAINST AS A RESULT OF HIS WIFE'S FILING OF AN ADMINISTRATIVE COMPLAINT OF EMPLOYMENT DISCRIMINATION, AS WAS FOUND BY THE JURY IN THIS CASE?

The Fifth Circuit held Petitioner lacked standing to assert a cause of action for retaliation under the ADEA. However, the Court's opinion fails to distinguish between standing and the relative merit of Plaintiff's cause of action. The determination of standing should not depend on the merits of Plaintiff's contention that particular conduct is illegal. *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343, 355 (1975). Rather, the issue "is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen*, 392 U.S. 83, 99-100, 88 S.Ct. 1942, 20 L.Ed.2d 947, 950 (1968).

In determining whether the Plaintiff has standing under the requirements of Article III of the United States

Constitution, a Court must determine whether the Plaintiff has alleged (1) an actual or threatened injury that is (2) traceable to the conduct of the Defendant and (3) is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). *See also Holt,* 89 F.3d at 1228 (Dennis, J., dissenting).

In addition to the minimum constitutional requirements, a Plaintiff must typically satisfy prudential considerations. *Warth,* 422 U.S. at 499, 95 S.Ct. at 2205, 45 L.Ed.2d at 355. However, Section 7(c) of the ADEA states "Any person aggrieved may bring a civil action" seeking relief. 29 U.S.C. §626(c)(1). This language has been interpreted to indicate Congressional intent to afford standing to the full limits permitted under Article III. *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 209, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972). Accordingly, a Plaintiff satisfying the Article III requirements has standing to assert a cause of action under the ADEA. *Horne v. Firemen's Retirement System of St. Louis,* 69 F.3d 233, 235 (8th Cir. 1995).

In the instant case, Frank Holt suffered injury as a result of an adverse employment action traceable to the conduct of Defendant, and his injury was capable of being redressed by a favorable jury verdict. Accordingly, Mr. Holt satisfies the requirements of Article III and, therefore, it was error for the Court to conclude that he lacks standing.

The majority opinion of the Court of Appeals was concerned in large part with having to define what relationships in the future would grant standing for claims of retaliation. *Holt*, 89 F.3d at 1227. However, as pointed out in the dissenting opinion, "The ultimate focus in a retaliation claim such as this is not upon whether a particular relationship existed between the victim of retaliation and the individual who is engaged in protected conduct; rather, the crucial issue is whether there is a **causal connection** between the employer's adverse employment action against the victim and the protected conduct engaged in by the relative or friend." *Id.*, 89 F.3d at 1232 (Dennis, J., dissenting) (emphasis added). The majority's concern is minimal, because a plaintiff asserting a cause of action for retaliation must still make out a *prima facie* case of retaliation. Accordingly, the role of the Courts is not to attempt to define by general rule what relationships will give rise to a cause of action, but rather to focus on the facts of each case, and to make a fact intensive determination as to whether this particular plaintiff is able to show that the adverse employment actions taken against him were in retaliation for protected conduct engaged in by another. Obviously, the closer the relationship between the victim and the individual who is engaged in the protected conduct, the easier it will be for a plaintiff to demonstrate a causal connection and *prima facie* case.

In this case, the jury heard all the evidence and concluded that, in fact, JTM had retaliated against Mr.

Holt. By focusing on the evidence presented in the individual case, as opposed to defining sufficient relationship between the parties, the burden will continue to rest with the plaintiff to prove he was actually retaliated against. *Mandia v. ARCO Chemical, supra; Thurman v. Robertshaw Control Co., supra; EEOC v. Ohio Edison Co., supra.*

CONCLUSION

Frank Holt proved to the satisfaction of a jury that he was removed from his position of plant manager in retaliation for his wife's protected ADEA activity. As determined by the trial judge, there was more than ample evidence to support the jury verdict. The majority opinion of the Fifth Circuit, denying relief on the basis that Mr. Holt lacks standing, is incorrect for three reasons. First, it is contrary to all existing precedent. Second, it is based upon a narrow, literal interpretation of the ADEA and Title VII which all Courts, including the Supreme Court, have rejected. Finally, it fails to recognize the proper definition of "standing" as clearly articulated by the Supreme Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

John Patrick Atkins
Counsel of Record
Philip E. McCleery
SHEEHY, LOVELACE &
MAYFIELD, P.C.
510 N. Valley Mills Dr., Suite 500
Waco, Texas 76710
(817) 772-8022
FAX: (817) 772-9297

ATTORNEYS FOR PETITIONER